

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STARR SWANSON,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of  
Social Security,

Defendant.

Case No. C12-510-RSM-BAT

**REPORT AND  
RECOMMENDATION**

Starr Swanson seeks review of the denial of her Disability Insurance Benefits application. She contends that the ALJ erred by (1) rejecting the opinions of her treating physician and treating psychologist and (2) finding Ms. Swanson not credible. Dkt. 11. As discussed below, the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings.

**I. FACTUAL AND PROCEDURAL HISTORY**

Ms. Swanson is currently 51 years old, completed 2 years of college, and has worked as a paralegal and administrative assistant.<sup>1</sup> On December 15, 2008, she applied for benefits, alleging disability as of June 2, 2006. Tr. 159. Her application was denied initially and on reconsideration. Tr. 93-101, 103-07. The ALJ conducted a hearing on September 9, 2010, and

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<sup>1</sup> Tr. 53, 159, 193.

1 issued a decision on October 29, 2010, finding Ms. Swanson not disabled. Tr. 93-101. As the  
 2 Appeals Council denied Ms. Swanson's request for review, the ALJ's decision is the  
 3 Commissioner's final decision. Tr. 1-6.

## 4 II. THE ALJ'S DECISION

5 Utilizing the five-step disability evaluation process,<sup>2</sup> the ALJ made the following  
 6 findings:

7 **Step one:** Ms. Swanson had not engaged in substantial gainful activity since June 2,  
 8 2006.

9 **Step two:** Ms. Swanson had the following severe impairments: degenerative disc  
 10 disease, status post foraminotomy, and status post hysterectomy.

11 **Step three:** These impairments did not meet or equal the requirements of a listed  
 12 impairment.<sup>3</sup>

13 **Residual Functional Capacity:** Ms. Swanson had the residual functional capacity to lift  
 14 and carry 10 pounds frequently and 20 pounds occasionally. She had no sitting, standing  
 15 or walking restrictions, and she could perform all posturals occasionally, except she could  
 16 never climb ladders, ropes or scaffolds. Right upper extremity overhead reaching and  
 17 right upper extremity gross handling was limited to frequently. She should avoid  
 18 concentrated exposure to hazards.

19 **Step four:** Ms. Swanson could perform her past work and was thus not disabled.  
 20 Alternatively, as there are jobs that exist in significant numbers that Ms. Swanson could  
 21 also perform, she was not disabled under the step-five framework as well.

22 Tr. 16-29.

## 23 III. DISCUSSION

### 24 A. Medical evidence

25 Ms. Swanson argues that the ALJ erred by rejecting the opinions of treating physician  
 26 Susan Casabona, M.D., and treating psychologist Sandra Saffran, Ph.D.

27 In general, the ALJ should give more weight to the opinion of a treating doctor than to

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28 <sup>2</sup> 20 C.F.R. §§ 404.1520, 416.920.

29 <sup>3</sup> 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 that of a non-treating doctor, and more weight to the opinion of an examining doctor than to that  
 2 of a non-examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where it is not  
 3 contradicted by another doctor, the ALJ may reject a treating or examining doctor's opinion only  
 4 for "clear and convincing reasons." *Id.* at 830-31. Where contradicted, the ALJ may not reject a  
 5 treating or examining doctor's opinion without "specific and legitimate reasons" that are  
 6 supported by substantial evidence in the record. *Id.* at 830-31 (quoting *Murray v. Heckler*, 722  
 7 F.2d 499, 502 (9th Cir. 1983)). An ALJ does this by setting out a detailed and thorough  
 8 summary of the facts and conflicting evidence, stating her interpretation of the facts and  
 9 evidence, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The  
 10 ALJ must do more than offer her conclusions; she must also explain why her interpretation,  
 11 rather than the treating doctor's interpretation, is correct. *Orn v. Astrue*, 495 F.3d 625, 632 (9th  
 12 Cir. 2007) (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

13 *I. Dr. Casabona*

14 Dr. Casabona opined as to Ms. Swanson's limitations on numerous occasions. Ms.  
 15 Swanson focuses her argument on a May 13, 2010, letter, which Dr. Casabona wrote to confirm  
 16 that Ms. Swanson was to undergo spine surgery on May 19, 2010. Tr. 689. Dr. Casabona  
 17 opined:

18 She has been unable to work in any capacity doing even sedentary work, since  
 19 August 2006, up until the present time. She is unable to function for the last one  
 20 and one half years due to the neck pain, right arm pain and weakness. She  
 21 experiences extreme arm and hand pain with routine daily activities and with self  
 22 care. She has undergone all non surgical treatments including physical therapy,  
 23 massage, acupuncture and various medications, without any improvement  
 whatsoever. The neck and arm pain occurred as a result of the long term  
 instability and weakness of her right leg and hip girdle and weakness of her core  
 body muscles. The leg and hip girdle injuries were direct surgical complications  
 of her June 2006 hysterectomy.

*Id.* The ALJ found that this statement was contradicted by Ms. Swanson's activities of daily

1 living and by her two trips to Hawaii and her trip to Texas. Tr. 26. The ALJ also found that Dr.  
2 Casabona's opinions generally did not include narrative statements to explain her opinions and  
3 did not cite to objective medical evidence to support her opinions. *Id.* The ALJ thus gave little  
4 weight to Dr. Casabona's opinions. *Id.*

5 An ALJ may reject a treating doctor's opinion that is unsupported by objective medical  
6 evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). However, to merely state  
7 that medical opinions are not supported by sufficient objective findings "does not achieve the  
8 level of specificity our prior cases have required, even when the objective factors are listed  
9 seriatim." *Embrey*, 849 F.2d at 421-22. Here, the ALJ made just such a conclusory statement,  
10 rather than explaining why her interpretation of the medical evidence was correct and Dr.  
11 Casabona's was not. This was not a valid reason for rejecting Dr. Casabona's opinions.

12 An ALJ may also reject a treating doctor's opinion that is inconsistent with other  
13 evidence in the record. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.  
14 2004). However, the ALJ merely refers to her previous discussion of Ms. Swanson's daily  
15 activities without explaining how the fact that Ms. Swanson carries on certain daily activities is  
16 inconsistent with Dr. Casabona's statement. Dr. Casabona stated that Ms. Swanson experienced  
17 pain with daily activities and with self care, not that Ms. Swanson was unable to engage in daily  
18 activities or self care at all. Without further explanation, this was not a valid reason for rejecting  
19 Dr. Casabona's opinions.

20 Similarly, the ALJ fails to explain how Ms. Swanson's trips were inconsistent with Dr.  
21 Casabona's statement. The fact that Ms. Swanson was able to travel on three occasions does not  
22 undermine her doctor's opinion about her ability to function on an ongoing basis in a workplace  
23 setting. *Cf. Howard v. Heckler*, 782 F.2d 1484, 1488 (9th Cir. 1986) (ability to engage in

1 periodic restricted travel does not undermine claim of disability). The ALJ failed to provide  
2 specific and legitimate reasons, supported by substantial evidence, to reject Dr. Casabona's  
3 opinions.

4 2. *Dr. Saffran*

5 In a September 2009 letter to Ms. Swanson's long-term disability insurance carrier, Dr.  
6 Saffran stated that she had treated Ms. Swanson since 2006. Tr. 744. Dr. Saffran stated that she  
7 had diagnosed Ms. Swanson with post-traumatic stress disorder (PTSD) – chronic with delayed  
8 onset, and major depressive disorder – moderate, and that her symptoms met the standards set  
9 forth in the DSM-IV, but she declined to elaborate on the specific signs and symptoms of Ms.  
10 Swanson's psychiatric condition. Tr. 745. She opined that Ms. Swanson's "functional  
11 impairment from her mental/nervous conditions may vary from mild to severe, and may fluctuate  
12 over time. . . . The functional limitations [Ms. Swanson] may encounter could affect her  
13 cognitive, emotional, and social functioning, and may be temporary, recur episodically, or be  
14 long-lasting." Tr. 745-46. Dr. Saffran then listed how Ms. Swanson's "mental health disabilities  
15 may likely interfere with work related abilities" in numerous areas, including mental alertness,  
16 concentration and organization, dealing with stress and anxiety. Tr. 746-47. She concluded:

17 At this time, as [Ms. Swanson's] psychiatric treatment provider, I cannot ethically  
18 allow her to return to work until her psychological stress and symptoms  
19 associated with PTSD have been stable over time. Again, the literature is well  
20 established in the findings that individuals who experience psychological stress,  
such as those listed above, may simply be having a bad day or a bad week or may  
be working through a difficult time in their lives, but if this pattern continues for a  
long period may indicate [sic] an underlying mental health disorder.

21 Tr. 748.

22 In a July 2009 opinion, Dr. Saffran assigned Ms. Swanson a global assessment of  
23 functioning ("GAF") score of 58, indicating moderate symptoms or moderate difficulties in

1 social, occupational, or school functioning, and stated that her low score in the precious year was  
2 48, indicating serious symptoms or a serious impairment in social, occupational, or school  
3 functioning. Tr. 683; Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental  
4 Disorders (DSM-IV), 34 (4th ed. text rev. 1994).

5 The ALJ found at step two that Ms. Swanson had the medically determinable mental  
6 impairments of depression and anxiety, but that, considered singly and in combination, they did  
7 not cause more than a minimal limitation in her ability to perform basic mental work activities  
8 and were therefore not severe. Tr. 22. In making this finding, the ALJ considered Dr. Saffran's  
9 September 2009 opinion, finding that it did not cite to any objective mental health testing, her  
10 opinion that Ms. Swanson "may" have problems was speculative, and it provided no objective  
11 basis for her opinion that Ms. Swanson was unable to return to work. Tr. 23. The ALJ therefore  
12 gave the opinion little weight. *Id.* The ALJ did not address Dr. Saffran's July 2009 opinion.

13 At step two, the claimant must show that (1) she has a medically determinable  
14 impairment or combination of impairments, and (2) the impairment or combination of  
15 impairments is severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146 (1987); 20 C.F.R. § 416.920(c).  
16 An impairment is severe if it significantly limits the claimant's physical or mental ability to do  
17 basic work activities. 20 C.F.R. § 416.920(c), 416.921(a). An impairment or combination of  
18 impairments can be found "not severe" only if the evidence establishes a slight abnormality that  
19 has no more than a minimal effect on an individual's ability to work. *Smolen v. Chater*, 80 F.3d  
20 1273, 1290 (9th Cir. 1996). The step-two inquiry is "a *de minimis* screening device to dispose of  
21 groundless claims." *Id.* It is not an inquiry as to whether the impairment is disabling or not.

22 Dr. Saffran opined that Ms. Swanson's mental impairments, including PTSD—which the  
23 ALJ did not address—would limit her ability to function to such an extent that she could not

1 work. Dr. Saffran also opined that Ms. Swanson's mental conditions had moderately to severely  
2 impaired her functioning over the course of a year. These opinions were sufficient evidence to  
3 pass the de minimis screening test and show that Ms. Swanson's claims of mental impairment  
4 were not groundless. But the ALJ failed to consider Dr. Saffran's July 2009 opinion. And the  
5 qualified nature of Dr. Saffran's September 2009 opinion is more properly considered when  
6 assessing the weight to give it in determining Ms. Swanson's residual functional capacity. The  
7 ALJ erred by rejecting Dr. Saffran's opinions outright at the initial, screening stage of the  
8 process.

9 **B. Ms. Swanson's credibility**

10 Ms. Swanson also argues that the ALJ improperly found her not credible. The ALJ did  
11 not find that Ms. Swanson was malingering. Thus, the ALJ was required to provide clear and  
12 convincing reasons to reject her testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th  
13 Cir. 2001). An ALJ does this by making specific findings supported by substantial evidence.  
14 "General findings are insufficient; rather, the ALJ must identify what testimony is not credible  
15 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

16 The ALJ gave several reasons for finding Ms. Swanson not fully credible. The ALJ  
17 found that the medical record showed that Ms. Swanson's mental and physical symptoms were  
18 controlled with medication. Tr. 25. The ALJ noted that Ms. Swanson's surgeon, Jayashree  
19 Srinivasan, M.D., reported after her May 2010 surgery that Ms. Swanson's arm symptoms had  
20 improved and Flexeril helped her pain, and that Dr. Casabona also reported improvement after  
21 the surgery and reported in February 2010 that Ms. Swanson's depression was fairly well  
22 controlled on Zoloft. *Id.* The type of treatment and the effectiveness of medication are factors  
23 the ALJ may consider in assessing credibility. 20 C.F.R. § 404.1529(c)(3). The ALJ thus could

1 consider the findings of improvement after surgery. However, this consideration is only relevant  
2 to the period after the surgery, which took place only four months before the hearing and five  
3 months before the ALJ issued the decision. The ALJ could also consider Dr. Casabona's opinion  
4 about the effectiveness of Zoloft on Ms. Swanson's depression. However, this opinion did not  
5 address the effectiveness of medication on Ms. Swanson's anxiety or PTSD. Therefore, while  
6 the effectiveness of medication was a valid consideration in evaluating Ms. Swanson's  
7 credibility, it only addressed a limited part of the credibility picture.

8         The ALJ found that Ms. Swanson's activities of daily living indicated she was not as  
9 disabled as she alleged. Tr. 25. The ALJ noted that Ms. Swanson took care of her cat and her  
10 dog, performed her own personal care activities, prepared simple meals, did laundry, dishes, and  
11 light housework, and was able to drive a car, shop in stores and online, and spend time with  
12 family and friends. *Id.* Daily activities that are transferrable to a work setting may be grounds  
13 for an adverse credibility finding. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). But daily  
14 activities that do not contradict a claimant's other testimony or meet the threshold for  
15 transferrable work skills cannot form the basis of an adverse credibility determination. *Orn*, 495  
16 F.3d at 639. These daily activities were not transferrable to a work setting. And the ALJ did not  
17 identify any contradiction between Ms. Swanson's testimony and her other statements about  
18 these activities. Thus, the mere fact that Ms. Swanson carried on certain daily activities was not  
19 a valid reason to question her credibility.

20         On the other hand, the ALJ also found that Ms. Swanson was very active in the legal  
21 aspects of her divorce and "spent three days in her attorney's office" preparing for her hearing.  
22 Tr. 25. Ms. Swanson reported this activity to her therapist in February 2009. Tr. 764. She also  
23 reported doing her own paralegal work for her divorce in October and November 2008, stating



1 that doing the work was “very bothersome” and caused pain to radiate through her arm. Tr. 560,  
2 556. Even though she reported that the paralegal work caused her pain, it was an activity  
3 transferrable to a work setting. Her ability to engage in it was a valid ground for the ALJ to  
4 discount her credibility.

5 The ALJ also found that there were numerous inconsistencies in the record that  
6 undermined Ms. Swanson’s credibility. Inconsistencies in the evidence can be a valid reason for  
7 discounting a claimant’s credibility. *See Smolen*, 80 F.3d at 1284. The ALJ found that Ms.  
8 Swanson reported that standing causes her pain, but also reported that she is able to walk for one  
9 mile and that walking helps her pain, which the ALJ concluded were conflicting statements. Tr.  
10 25. But these statements are not inconsistent. Walking and standing are different activities. It is  
11 not inconsistent that a claimant may more easily tolerate the movement involved with walking  
12 than the immobility of standing. This was not a valid reason to find Ms. Swanson not credible.

13 The ALJ also found that Ms Swanson completed her initial questionnaire for physical  
14 therapy on September 24, 2008, but did not begin attending therapy until June 2009, and later  
15 stopped attending therapy for three months, from April to July 2010. Tr. 25. But a review of the  
16 record shows that this finding is factually incorrect. Ms. Swanson in fact attended her first  
17 therapy session on September 29, 2008, and attended multiple times per month from that date  
18 through June 2009. Tr. 883-91. Ms. Swanson also attended physical therapy multiple times in  
19 June 2010, leaving a gap only for the month of May, contradictory to what the ALJ found. Tr.  
20 874. This finding of inconsistency was factually incorrect and therefore not a valid reason to  
21 find Ms. Swanson not credible.

22 The ALJ found that Ms. Swanson’s various trips further undermined her credibility,  
23 referring to her two trips to Hawaii and one trip to Texas during the alleged disability period. Tr.

26. But an ALJ may not discount a claimant's credibility based on a capacity to engage in periodic restricted travel. *Howard*, 782 F.2d at 1488. This was not a valid reason to discount Ms. Swanson's credibility.<sup>4</sup>

Although the ALJ relied one valid and one partially valid reason to find Ms. Swanson not fully credible, she relied primarily on reasons that were invalid. An ALJ's use of an invalid reason for finding a claimant not credible may be harmless if the remaining reasons and the ultimate credibility finding were supported by substantial evidence. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008). Here, the ALJ's reliance on invalid reasons outweighed her reliance on valid ones. Given that fact, coupled with the error at step two in assessing Ms. Swanson's mental impairments, the Court cannot say with confidence that, excluding the invalid reasons, there remains substantial evidence to support the ALJ's conclusion. The Court therefore finds the ALJ's errors in evaluating Ms. Swanson's credibility were not harmless and the issue should be reconsidered on remand.

#### IV. CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be **REVERSED** and the case be **REMANDED** for further administrative proceedings. The Court may remand for an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen*, 80 F.3d at 1292). This occurs when: (1) the ALJ has

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<sup>4</sup> Ms. Swanson states in her brief that the ALJ rejected the lay witness statements she submitted regarding her trips "based on the same erroneous analysis." Dkt. 11 at 8. She does not present any argument or authority specific to this assertion. Claims that are unsupported by explanation or authority may be deemed waived. *See Avila v. Astrue*, No. C07-1331, 2008 WL 4104300 (E.D. Cal. Sept. 2, 2008) at \*2 (unpublished opinion) (citing *NW Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923-24 (9th Cir. 1996) (party who presents no explanation in support of claim of error waives issue); *Independent Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003)). The Court rejects this argument as waived.

1 failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no  
2 outstanding issues that must be resolved before a determination of disability can be made; and  
3 (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he  
4 considered the claimant's evidence. *Id.* at 1076-77. The Court concludes it is appropriate to  
5 remand this case for further proceedings. On remand, the ALJ should (1) reevaluate Ms.  
6 Swanson's mental impairments as severe impairments, (2) reevaluate the opinion of Dr.  
7 Casabona, (3) reevaluate Ms. Swanson's credibility, and (4) proceed with the remainder of the  
8 five-step evaluation process as necessary.

9 A proposed order accompanies this Report and Recommendation. Objections, if any, to  
10 this Report and Recommendation must be filed and served no later than **November 14, 2012**. If  
11 no objections are filed, the matter will be ready for the Court's consideration on **November 16,**  
12 **2012**. If objections are filed, any response is due within 14 days after being served with the  
13 objections. A party filing an objection must note the matter for the Court's consideration 14  
14 days from the date the objection is filed and served. Objections and responses shall not exceed  
15 twelve pages. The failure to timely object may affect the right to appeal.

16 DATED this 31st day of October, 2012.

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19 BRIAN A. TSUCHIDA  
20 United States Magistrate Judge  
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